UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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| UNITED STATES OF AMERICA | : | |
| | : | |
| | : | |
| | : | **FINAL JURY CHARGE [Draft]** |
| -against- | : | |
| | : | 1:22-cr-355 (ENV) |
| HECTOR ROSARIO, | : | |
| | : | |
| Defendant. | : | |

VITALIANO, D.J.

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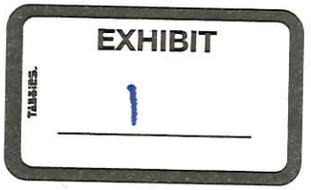

## I. GENERAL RULES

### PRELIMINARY INSTRUCTIONS

**MEMBERS OF THE JURY, NOW THAT THE EVIDENCE IN THIS CASE HAS BEEN PRESENTED AND THE ATTORNEYS FOR THE GOVERNMENT AND THE DEFENDANT HAVE CONCLUDED THEIR CLOSING ARGUMENTS, IT IS MY RESPONSIBILITY TO INSTRUCT YOU AS TO THE LAW THAT GOVERNS THIS CASE. BEFORE I DO SO, I WANT TO THANK YOU FOR YOUR PATIENCE AND COOPERATION.**

**MY INSTRUCTIONS WILL BE IN THREE PARTS:**

**FIRST: I WILL INSTRUCT YOU REGARDING THE GENERAL RULES THAT DEFINE AND GOVERN THE DUTIES OF A JURY IN A CRIMINAL CASE;**

**SECOND: I WILL INSTRUCT YOU AS TO THE LEGAL ELEMENTS OF THE CRIMES CHARGED IN THE INDICTMENT—THAT IS, THE SPECIFIC ELEMENTS THAT THE GOVERNMENT MUST PROVE BEYOND A REASONABLE**

**DOUBT TO WARRANT A FINDING OF GUILT; AND**

**<u>THIRD</u>: I WILL GIVE YOU SOME GENERAL RULES REGARDING YOUR DELIBERATIONS.**

## THE DUTIES OF THE JURY

**BY WAY OF A REFRESHER, YOU HAVE NOW HEARD ALL OF THE EVIDENCE IN THE CASE, AS WELL AS THE FINAL ARGUMENTS OF THE LAWYERS FOR THE PARTIES.**

**IT IS YOUR DUTY TO FIND THE FACTS FROM ALL THE EVIDENCE IN THIS CASE. YOU ARE THE SOLE JUDGES OF THE FACTS, AND IT IS, THEREFORE, FOR YOU AND YOU ALONE TO PASS UPON THE WEIGHT OF THE EVIDENCE, TO RESOLVE SUCH CONFLICTS AS MAY HAVE APPEARED IN THE EVIDENCE, AND TO DRAW SUCH INFERENCES AS YOU DEEM TO BE REASONABLE AND WARRANTED FROM THE EVIDENCE OR LACK OF EVIDENCE IN THIS CASE.**

**WITH RESPECT TO ANY QUESTION CONCERNING THE FACTS, IT IS YOUR RECOLLECTION OF THE EVIDENCE THAT CONTROLS.**

**TO THE FACTS AS YOU FIND THEM, YOU MUST APPLY THE LAW IN ACCORDANCE WITH MY INSTRUCTIONS.**

**WHILE THE LAWYERS MAY HAVE COMMENTED ON SOME OF THESE LEGAL RULES, YOU MUST BE GUIDED ONLY BY WHAT I INSTRUCT YOU ABOUT THEM. YOU MUST FOLLOW ALL THE RULES AS I EXPLAIN THEM TO YOU. YOU MAY NOT FOLLOW SOME AND IGNORE OTHERS; EVEN IF YOU DISAGREE WITH OR DO NOT UNDERSTAND THE REASONS FOR SOME OF THE RULES, YOU ARE BOUND TO FOLLOW THEM.**

**I EXPRESS NO VIEW WHETHER THE DEFENDANT IS GUILTY OR NOT GUILTY OR AS TO ANY FACT. YOU SHOULD NOT DRAW ANY INFERENCE OR REACH ANY CONCLUSION AS TO WHETHER THE DEFENDANT IS GUILTY OR NOT GUILTY FROM ANYTHING I MAY HAVE SAID OR DONE. YOU WILL DECIDE THE CASE SOLELY ON THE FACTS YOU FIND AND THE LAW AS I GIVE IT TO YOU.**

## PARTIES ARE EQUAL BEFORE THE COURT

**IN REACHING YOUR VERDICT, YOU ARE TO PERFORM THE DUTY OF FINDING THE FACTS WITHOUT BIAS OR PREJUDICE AS TO ANY PARTY. YOU MUST REMEMBER THAT ALL PARTIES STAND EQUAL BEFORE A JURY IN THE COURTS OF THE UNITED STATES. THE FACT THAT THE GOVERNMENT IS A PARTY AND THE PROSECUTION IS BROUGHT IN THE NAME OF THE UNITED STATES DOES NOT ENTITLE THE GOVERNMENT OR ITS WITNESSES TO ANY GREATER CONSIDERATION THAN THAT ACCORDED TO THE DEFENDANT. BY THE SAME TOKEN, YOU MUST GIVE IT NO LESS CONSIDERATION. YOUR VERDICT MUST BE BASED SOLELY ON THE EVIDENCE OR LACK OF EVIDENCE.**

**FOR THE SAME REASONS, THE PERSONALITIES AND THE CONDUCT OF COUNSEL ARE NOT IN ANY WAY IN ISSUE. IF YOU FORMED REACTIONS OF ANY KIND TO ANY OF THE LAWYERS IN THE CASE, FAVORABLE OR**

**UNFAVORABLE, WHETHER YOU APPROVED OR DISAPPROVED OF THEIR BEHAVIOR, THOSE REACTIONS MUST NOT ENTER INTO YOUR DELIBERATIONS.**

**DURING THE COURSE OF THE TRIAL, I MAY HAVE ADMONISHED AN ATTORNEY. YOU SHOULD DRAW NO INFERENCE AGAINST THE ATTORNEY OR THE CLIENT. IT IS THE DUTY OF THE ATTORNEYS TO OFFER EVIDENCE AND PRESS OBJECTIONS ON BEHALF OF THEIR SIDE. IT IS MY FUNCTION TO CUT OFF COUNSEL FROM AN IMPROPER LINE OF ARGUMENT OR QUESTIONING AND TO STRIKE ANSWERS WHEN I THINK IT IS NECESSARY. BUT YOU SHOULD DRAW NO INFERENCE FROM THAT.**

## PRESUMPTION OF INNOCENCE

THE INDICTMENT THAT WAS FILED AGAINST THE DEFENDANT IS THE MEANS BY WHICH THE GOVERNMENT GIVES THE DEFENDANT NOTICE OF THE CHARGES AGAINST HIM AND BRINGS HIM BEFORE THE COURT. THE INDICTMENT IS AN ACCUSATION AND NOTHING MORE. THE INDICTMENT IS NOT EVIDENCE, AND YOU ARE TO GIVE IT NO WEIGHT IN ARRIVING AT YOUR VERDICT.

THE DEFENDANT, IN RESPONSE TO THE INDICTMENT, PLEADED "NOT GUILTY." A DEFENDANT IS PRESUMED TO BE INNOCENT UNLESS HIS GUILT HAS BEEN PROVEN BEYOND A REASONABLE DOUBT, AND THAT PRESUMPTION ALONE, UNLESS OVERCOME, IS SUFFICIENT TO ACQUIT HIM. THE DEFENDANT IS ON TRIAL FOR THE CRIMES CHARGED AGAINST HIM IN THE INDICTMENT AND NOT FOR ANYTHING ELSE.

## BURDEN OF PROOF

**THE GOVERNMENT HAS THE BURDEN—THAT IS, THE OBLIGATION—OF PROVING GUILT BEYOND A REASONABLE DOUBT. THIS BURDEN NEVER SHIFTS TO THE DEFENDANT. A DEFENDANT DOES NOT HAVE TO PROVE HIS INNOCENCE; HE NEED NOT SUBMIT ANY EVIDENCE AT ALL. AND EVEN IF THE DEFENDANT HAS SUBMITTED EVIDENCE, THE BURDEN OF PROOF NEVER SHIFTS TO THE DEFENDANT. IT ALWAYS STAYS WITH THE GOVERNMENT.**

## REASONABLE DOUBT

**SINCE, IN ORDER TO CONVICT THE DEFENDANT OF A GIVEN CHARGE, THE GOVERNMENT IS REQUIRED TO PROVE THAT CHARGE BEYOND A REASONABLE DOUBT, THE QUESTION THEN IS: WHAT IS REASONABLE DOUBT?**

**THE WORDS ALMOST DEFINE THEMSELVES. IT IS A DOUBT BASED UPON REASON. IT IS A DOUBT THAT A REASONABLE PERSON HAS AFTER CAREFULLY WEIGHING ALL OF THE EVIDENCE OR LACK OF EVIDENCE. IT IS A DOUBT THAT WOULD CAUSE A REASONABLE PERSON TO HESITATE TO ACT IN A MATTER OF IMPORTANCE IN HIS OR HER PERSONAL LIFE. PROOF BEYOND A REASONABLE DOUBT MUST, THEREFORE, BE PROOF OF A CONVINCING CHARACTER THAT A REASONABLE PERSON WOULD NOT HESITATE TO RELY UPON IN MAKING AN IMPORTANT DECISION.**

**A REASONABLE DOUBT IS NOT CAPRICE OR WHIM. IT**

**IS NOT SPECULATION OR SUSPICION. IT IS NOT AN EXCUSE TO AVOID THE PERFORMANCE OF AN UNPLEASANT DUTY. THE LAW DOES NOT REQUIRE THAT THE GOVERNMENT PROVE GUILT BEYOND ALL POSSIBLE DOUBT: PROOF BEYOND A REASONABLE DOUBT IS SUFFICIENT TO CONVICT.**

**IF, AFTER FAIR AND IMPARTIAL CONSIDERATION OF THE EVIDENCE, YOU HAVE A REASONABLE DOUBT AS TO THE DEFENDANT'S GUILT WITH RESPECT TO A PARTICULAR CHARGE AGAINST HIM, YOU MUST FIND THE DEFENDANT NOT GUILTY OF THAT CHARGE. ON THE OTHER HAND, IF AFTER FAIR AND IMPARTIAL CONSIDERATION OF ALL THE EVIDENCE, YOU ARE SATISFIED BEYOND A REASONABLE DOUBT OF THE DEFENDANT'S GUILT WITH RESPECT TO A PARTICULAR CHARGE AGAINST HIM, YOU SHOULD FIND THE DEFENDANT GUILTY OF THAT CHARGE.**

## EVIDENCE GENERALLY

**I WISH TO EXPAND NOW ON THE INSTRUCTIONS I GAVE YOU AT THE BEGINNING OF THE TRIAL AS TO WHAT IS EVIDENCE AND HOW YOU SHOULD CONSIDER IT. EVIDENCE COMES IN SEVERAL FORMS, INCLUDING:**

**A. SWORN TESTIMONY OF WITNESSES, BOTH ON DIRECT AND CROSS-EXAMINATION, AND REGARDLESS OF WHO CALLED THE WITNESS;**

**B. EXHIBITS THAT HAVE BEEN RECEIVED IN EVIDENCE BY THE COURT; AND**

**C. FACTS TO WHICH ALL THE LAWYERS HAVE AGREED OR STIPULATED.**

## STIPULATIONS

**THE PARTIES HAVE STIPULATED TO CERTAIN FACTS IN THIS CASE. SUCH A STIPULATION IS AN AGREEMENT AMONG THE PARTIES THAT A CERTAIN FACT IS TRUE. YOU MUST CONSIDER SUCH STIPULATED FACTS AS TRUE.**

## WHAT IS NOT EVIDENCE

AS I SAID AT THE BEGINNING OF THE TRIAL, CERTAIN THINGS ARE NOT EVIDENCE AND ARE TO BE DISREGARDED BY YOU IN DECIDING WHAT THE FACTS ARE. THEY ARE AS FOLLOWS:

FIRST, ARGUMENTS OR STATEMENTS BY LAWYERS ARE NOT EVIDENCE.

QUESTIONS PUT TO THE WITNESSES ARE NOT EVIDENCE. IT IS THE QUESTION COMBINED WITH THE ANSWER THAT IS EVIDENCE.

IN ADDITION TO THE LAWYERS' QUESTIONS, I OCCASIONALLY MAY HAVE ASKED QUESTIONS FOR PURPOSES OF CLARIFICATION. PLEASE DO NOT ASSUME THAT THE QUESTIONS ARE EVIDENCE OR THAT I HOLD ANY OPINION ON THE MATTERS TO WHICH ANY QUESTIONS MAY HAVE RELATED. I DO NOT. THOSE QUESTIONS WERE ASKED SOLELY IN AN EFFORT OR ATTEMPT TO MAKE SOMETHING CLEARER.

SIMILARLY, OBJECTIONS TO QUESTIONS OR TO OFFERED EXHIBITS ARE NOT EVIDENCE. IN THIS REGARD, ATTORNEYS HAVE A DUTY TO THEIR CLIENTS TO OBJECT WHEN THEY BELIEVE EVIDENCE SHOULD NOT BE RECEIVED. YOU SHOULD NOT BE INFLUENCED BY THE OBJECTION OR BY THE COURT'S RULING ON IT. IF THE OBJECTION WAS SUSTAINED, IGNORE THE QUESTION. IF THE OBJECTION WAS OVERRULED, TREAT THE ANSWER LIKE ANY OTHER ANSWER.

OF COURSE, TESTIMONY THAT HAS BEEN STRICKEN OR THAT YOU HAVE BEEN INSTRUCTED TO DISREGARD IS NOT EVIDENCE AND MUST BE DISREGARDED.

EQUALLY OBVIOUS, ANYTHING YOU MAY HAVE SEEN OR HEARD OUTSIDE THE COURTROOM IS NOT EVIDENCE.

FINALLY, IT WOULD BE IMPROPER FOR YOU TO CONSIDER, IN REACHING YOUR DECISION AS TO WHETHER THE GOVERNMENT SUSTAINED ITS BURDEN OF PROOF, ANY PERSONAL FEELINGS YOU MAY HAVE ABOUT

**A DEFENDANT'S RACE, RELIGION, NATIONAL ORIGIN, ETHNIC BACKGROUND, SEX, SEXUAL ORIENTATION, OR AGE. ALL PERSONS ARE ENTITLED TO THE PRESUMPTION OF INNOCENCE, AND THE GOVERNMENT HAS THE SAME BURDEN OF PROOF. IN ADDITION, IT WOULD BE EQUALLY IMPROPER FOR YOU TO ALLOW ANY FEELINGS YOU MIGHT HAVE ABOUT THE GOVERNMENT OF THE UNITED STATES OR THE NATURE OF THE CRIME CHARGED TO INTERFERE WITH YOUR DECISIONMAKING PROCESS.**

**TO REPEAT, YOUR VERDICT MUST BE BASED EXCLUSIVELY UPON THE EVIDENCE OR THE LACK OF EVIDENCE IN THE CASE.**

## RECORDINGS AND TRANSCRIPTS

**THE GOVERNMENT HAS OFFERED EVIDENCE IN THE FORM OF RECORDINGS OF TELEPHONE CALLS AND IN-PERSON MEETINGS. THESE CALLS AND MEETINGS WERE LAWFULLY RECORDED. WHILE THE RECORDINGS WERE PLAYED, YOU WERE SHOWN A TRANSCRIPT OF THE RECORDING, SOME OF WHICH INCLUDED ENGLISH TRANSLATIONS FROM SPANISH.**

**AS TO THE PORTIONS OF THE RECORDINGS THAT ARE SPOKEN IN SPANISH, I INSTRUCT YOU THAT IT IS THE ENGLISH TRANSLATION OF THE SPANISH-LANGUAGE PORTION OF THE CONVERSATION REFLECTED ON THE TRANSCRIPTS THAT IS THE EVIDENCE, AND YOU MUST ACCEPT THIS TRANSLATION PURSUANT TO THE STIPULATION OF THE PARTIES, EVEN IF YOU ARE CONVERSANT IN THE SPANISH LANGUAGE AND WOULD HAVE TRANSLATED THE WORDS DIFFERENTLY. AS TO THE PORTIONS OF THE RECORDINGS THAT ARE SPOKEN IN**

**ENGLISH RATHER THAN SPANISH, ALTHOUGH YOU MAY USE THE TRANSCRIPT AS AN AID OR GUIDE TO ASSIST YOU IN LISTENING TO THE PORTIONS OF THE RECORDINGS IN ENGLISH, YOU ALONE SHOULD REACH YOUR OWN DECISION OF WHAT IS ON THE RECORDINGS IN ENGLISH BASED UPON WHAT YOU HEARD. IF YOU THINK YOU HEARD SOMETHING DIFFERENT IN ENGLISH THAN APPEARED IN THE TRANSCRIPT, THEN WHAT YOU HEARD IS CONTROLLING, NOT THE TRANSCRIPT.**

**WHETHER YOU APPROVE OR DISAPPROVE OF THE RECORDING OF THOSE CONVERSATIONS MAY NOT ENTER YOUR DELIBERATIONS. I INSTRUCT YOU THAT THESE RECORDINGS WERE PROPERLY ADMITTED INTO EVIDENCE AT THIS TRIAL. YOU SHOULD CONSIDER THIS EVIDENCE ALONG WITH ALL OF THE OTHER EVIDENCE IN THIS CASE IN DETERMINING WHETHER THE GOVERNMENT HAS PROVED BEYOND A REASONABLE DOUBT THE GUILT OF THE DEFENDANT.**

**LET ME SAY AGAIN, YOU, THE JURY, ARE THE SOLE JUDGES OF THE FACTS.**

## DIRECT AND CIRCUMSTANTIAL EVIDENCE

**I TOLD YOU THAT EVIDENCE COMES IN VARIOUS FORMS SUCH AS THE SWORN TESTIMONY OF WITNESSES, EXHIBITS, AND STIPULATIONS.**

**THERE ARE, IN ADDITION, TWO DIFFERENT KINDS OF EVIDENCE—DIRECT AND CIRCUMSTANTIAL.**

**DIRECT EVIDENCE IS THE COMMUNICATION OF A FACT BY A WITNESS, WHO TESTIFIED TO THE KNOWLEDGE OF THAT FACT AS HAVING BEEN OBTAINED THROUGH ONE OF THE FIVE SENSES. SO, FOR EXAMPLE, A WITNESS WHO TESTIFIED TO KNOWLEDGE OF A FACT BECAUSE HE SAW IT, HEARD IT, SMELLED IT, TASTED IT, OR TOUCHED IT IS GIVING EVIDENCE WHICH IS DIRECT. WHAT REMAINS IS YOUR RESPONSIBILITY TO PASS UPON THE CREDIBILITY OF THE TESTIMONY THAT WITNESS GAVE.**

**CIRCUMSTANTIAL EVIDENCE IS EVIDENCE WHICH**

**TENDS TO PROVE A FACT IN ISSUE BY PROOF OF OTHER FACTS FROM WHICH THE FACT IN ISSUE MAY BE INFERRED.**

**THE WORD "INFER"—OR THE EXPRESSION "TO DRAW AN INFERENCE"—MEANS TO FIND THAT A FACT EXISTS FROM PROOF OF ANOTHER FACT. FOR EXAMPLE, IF A FACT IN ISSUE IS WHETHER IT IS RAINING AT THE MOMENT, NONE OF US CAN TESTIFY DIRECTLY TO THAT FACT SITTING AS WE ARE IN WHAT IS AN ESSENTIALLY WINDOWLESS COURTROOM. ASSUME, HOWEVER, THAT AS WE ARE SITTING HERE, A PERSON WALKS INTO THE COURTROOM WEARING A RAINCOAT THAT IS DRIPPING WET AND CARRYING AN UMBRELLA THAT IS DRIPPING WATER. WE MAY INFER FROM THOSE FACTS THAT IT IS RAINING OUTSIDE. IN OTHER WORDS, THE FACT OF RAIN IS AN INFERENCE THAT COULD BE DRAWN FROM THE WET RAINCOAT AND THE DRIPPING UMBRELLA.**

**HOWEVER, FROM THE DIRECT EVIDENCE OF YOUR**

OBSERVATION OF A PERSON ENTERING THE COURTROOM WEARING A WET RAINCOAT AND CARRYING A WET UMBRELLA ALONE, YOU COULD NOT INFER EXACTLY WHEN THE RAIN HAD STARTED OR FOR HOW LONG IT HAD RAINED.

AN INFERENCE IS TO BE DRAWN ONLY IF IT IS LOGICAL AND REASONABLE TO DO SO. IN DECIDING WHETHER TO DRAW AN INFERENCE, YOU MUST LOOK AT AND CONSIDER ALL THE FACTS IN THE LIGHT OF REASON, COMMON SENSE, AND EXPERIENCE. WHETHER A GIVEN INFERENCE IS OR IS NOT TO BE DRAWN IS ENTIRELY A MATTER FOR YOU, THE JURY, TO DECIDE. PLEASE BEAR IN MIND, HOWEVER, THAT AN INFERENCE IS NOT TO BE DRAWN BY GUESSWORK OR SPECULATION.

I REMIND YOU ONCE AGAIN THAT YOU MAY NOT CONVICT THE DEFENDANT UNLESS YOU ARE SATISFIED OF HIS GUILT BEYOND A REASONABLE DOUBT, WHETHER BASED ON DIRECT EVIDENCE, CIRCUMSTANTIAL

**EVIDENCE, OR THE LOGICAL INFERENCES TO BE DRAWN FROM SUCH EVIDENCE.**

**CIRCUMSTANTIAL EVIDENCE DOES NOT NECESSARILY PROVE LESS THAN DIRECT EVIDENCE, NOR DOES IT NECESSARILY PROVE MORE. YOU ARE TO CONSIDER ALL THE EVIDENCE IN THE CASE, DIRECT AND CIRCUMSTANTIAL, IN DETERMINING WHAT THE FACTS ARE AND IN ARRIVING AT YOUR VERDICT.**

## INFERENCES

**I WILL NOW INSTRUCT YOU FURTHER ABOUT INFERENCES. DURING THE TRIAL, YOU MAY HAVE HEARD THE ATTORNEYS USE THE TERM "INFERENCE," AND IN THEIR ARGUMENTS THEY MAY HAVE ASKED YOU TO INFER, ON THE BASIS OF YOUR REASON, EXPERIENCE AND COMMON SENSE, FROM ONE OR MORE PROVEN FACTS, THE EXISTENCE OF SOME OTHER FACTS.**

**AN INFERENCE IS NOT A SUSPICION OR A GUESS. IT IS A LOGICAL CONCLUSION THAT A DISPUTED FACT EXISTS THAT WE REACH IN LIGHT OF ANOTHER FACT WHICH HAS BEEN SHOWN TO EXIST. THERE ARE TIMES WHEN DIFFERENT INFERENCES MAY BE DRAWN FROM FACTS, WHETHER PROVED BY DIRECT OR CIRCUMSTANTIAL EVIDENCE. IT IS FOR YOU, AND YOU ALONE, TO DECIDE WHAT INFERENCES YOU WILL DRAW.**

**KEEP IN MIND THAT THE MERE EXISTENCE OF AN**

**INFERENCE AGAINST THE DEFENDANT DOES NOT RELIEVE THE GOVERNMENT OF THE BURDEN OF ESTABLISHING ITS CASE BEYOND A REASONABLE DOUBT.**

## IMPERMISSIBLE TO INFER PARTICIPATION FROM ASSOCIATION

**ON THE SUBJECT OF INFERENCES, ALSO KEEP IN MIND THAT YOU MAY NOT INFER THAT THE DEFENDANT WAS GUILTY OF PARTICIPATING IN CRIMINAL CONDUCT MERELY FROM THE FACT THAT HE ASSOCIATED WITH OTHER PEOPLE WHO WERE GUILTY OF WRONGDOING.**

## WEIGHING CREDIBILITY INCLUDING *FALSUS IN UNO*

**IN DECIDING WHAT THE FACTS ARE, YOU MUST DECIDE WHICH TESTIMONY TO BELIEVE AND WHICH TESTIMONY NOT TO BELIEVE. IN MAKING THAT DECISION, YOU SHOULD USE THE SAME REASON YOU WOULD EMPLOY IN MAKING DETERMINATIONS IMPORTANT IN YOUR OWN AFFAIRS THAT ARE BASED ON INFORMATION GIVEN TO YOU BY OTHERS. THERE ARE A NUMBER OF FACTORS YOU MAY TAKE INTO ACCOUNT IN DETERMINING WHETHER THE TESTIMONY OF A WITNESS IS BELIEVABLE, INCLUDING THE FOLLOWING:**

**(1) DID THE WITNESS IMPRESS YOU AS HONEST?**

**(2) DID THE WITNESS HAVE ANY PARTICULAR REASON NOT TO TELL THE TRUTH?**

**(3) DID THE WITNESS HAVE A PERSONAL INTEREST IN THE CASE?**

**(4) DID THE WITNESS SEEM TO HAVE A GOOD MEMORY?**

**(5) DID THE WITNESS HAVE THE OPPORTUNITY AND ABILITY TO OBSERVE ACCURATELY THE THINGS THEY TESTIFIED ABOUT?**

**(6) DID THE WITNESS APPEAR TO UNDERSTAND THE QUESTIONS CLEARLY AND ANSWER THEM DIRECTLY?**

**(7) DID THE WITNESS'S TESTIMONY DIFFER FROM THE TESTIMONY OF OTHER WITNESSES?**

**PEOPLE SOMETIMES FORGET THINGS. A CONTRADICTION MAY BE AN INNOCENT LAPSE OF MEMORY OR IT MAY BE AN INTENTIONAL FALSEHOOD. CONSIDER, THEREFORE, WHETHER THE CONTRADICTION, IF THERE WAS ONE, HAS TO DO WITH AN IMPORTANT FACT OR ONLY A SMALL DETAIL.**

**DIFFERENT PEOPLE OBSERVING AN EVENT MAY**

**REMEMBER IT DIFFERENTLY AND THEREFORE TESTIFY ABOUT IT DIFFERENTLY.**

**BUT, IF ANY WITNESS IS SHOWN TO HAVE WILLFULLY LIED ABOUT ANY MATERIAL MATTER, YOU HAVE THE RIGHT TO CONCLUDE THAT THE WITNESS ALSO LIED ABOUT OTHER MATTERS. YOU MAY EITHER DISREGARD ALL OF THAT WITNESS'S TESTIMONY, OR YOU MAY ACCEPT WHATEVER PART OF IT YOU THINK DESERVES TO BE BELIEVED.**

**YOU MAY CONSIDER THE FACTORS I HAVE JUST DISCUSSED WITH YOU IN DECIDING HOW MUCH WEIGHT TO GIVE TO TESTIMONY.**

## WITNESS CREDIBILITY—GENERAL INSTRUCTION

**IT MUST BE CLEAR TO YOU BY NOW THAT THE GOVERNMENT AND THE DEFENDANT ARE ASKING YOU TO DRAW VERY DIFFERENT CONCLUSIONS ABOUT VARIOUS FACTUAL ISSUES IN THE CASE. DECIDING THESE ISSUES WILL INVOLVE MAKING JUDGMENTS ABOUT THE TESTIMONY OF THE WITNESSES YOU HAVE LISTENED TO AND OBSERVED. GIVEN ITS IMPORTANCE, I WILL EXPOUND ON MY INSTRUCTIONS ABOUT FACTORS YOU MIGHT CONSIDER IN MAKING JUDGMENTS AS TO THE CREDIBILITY OR BELIEVABILITY OF THE TESTIMONY YOU HEARD. IN MAKING THESE JUDGMENTS, YOU SHOULD CAREFULLY SCRUTINIZE ALL OF THE TESTIMONY OF EACH WITNESS, THE CIRCUMSTANCES UNDER WHICH EACH WITNESS TESTIFIED, AND ANY OTHER MATTER IN EVIDENCE THAT MAY HELP YOU TO DECIDE THE TRUTH AND THE IMPORTANCE OF EACH WITNESS'S TESTIMONY.**

**YOUR DECISION WHETHER OR NOT TO BELIEVE A**

**WITNESS MAY DEPEND ON HOW THAT WITNESS IMPRESSED YOU. HOW DID THE WITNESS APPEAR? WAS THE WITNESS CANDID, FRANK, AND FORTHRIGHT; OR, DID THE WITNESS SEEM TO BE EVASIVE OR SUSPECT IN SOME WAY? HOW DID THE WAY THE WITNESS TESTIFIED ON DIRECT EXAMINATION COMPARE WITH HOW THE WITNESS TESTIFIED ON CROSS-EXAMINATION? WAS THE WITNESS CONSISTENT OR CONTRADICTORY? DID THE WITNESS APPEAR TO KNOW WHAT HE OR SHE WAS TALKING ABOUT? DID THE WITNESS STRIKE YOU AS SOMEONE WHO WAS TRYING TO REPORT HIS OR HER KNOWLEDGE ACCURATELY? THESE ARE EXAMPLES OF THE KINDS OF COMMON SENSE QUESTIONS YOU SHOULD ASK YOURSELVES IN DECIDING WHETHER A WITNESS IS, OR IS NOT, TRUTHFUL.**

**YOU SHOULD ALSO CONSIDER WHETHER A WITNESS HAD AN OPPORTUNITY TO OBSERVE THE FACTS HE OR SHE TESTIFIED ABOUT. ALSO, YOU SHOULD CONSIDER**

**WHETHER THE WITNESS'S RECOLLECTION OF THE FACTS STANDS UP IN LIGHT OF THE OTHER EVIDENCE IN THE CASE.**

**IN OTHER WORDS, WHAT YOU MUST TRY TO DO IN DECIDING CREDIBILITY IS TO SIZE UP A PERSON JUST AS YOU WOULD IN ANY IMPORTANT MATTER WHEN YOU ARE TRYING TO DECIDE IF A PERSON IS TRUTHFUL, STRAIGHTFORWARD, AND ACCURATE IN HIS OR HER RECOLLECTION.**

## INTEREST IN OUTCOME

**IN EVALUATING CREDIBILITY OF THE WITNESSES, YOU SHOULD TAKE INTO ACCOUNT ANY EVIDENCE THAT THE WITNESS WHO TESTIFIED MAY BENEFIT IN SOME WAY FROM THE OUTCOME OF THIS CASE. THEREFORE, IF YOU FIND THAT ANY WITNESS WHOSE TESTIMONY YOU ARE CONSIDERING MAY HAVE AN INTEREST IN THE OUTCOME OF THIS TRIAL, THEN YOU SHOULD BEAR THAT FACTOR IN MIND WHEN EVALUATING THE CREDIBILITY OF HIS OR HER TESTIMONY AND ACCEPT IT WITH GREAT CARE.**

**THIS IS NOT TO SUGGEST THAT EVERY WITNESS WHO HAS AN INTEREST IN THE OUTCOME OF A CASE WILL TESTIFY FALSELY. IT IS FOR YOU TO DECIDE TO WHAT EXTENT, IF AT ALL, THE WITNESS' INTEREST HAS AFFECTED OR COLORED HIS OR HER TESTIMONY.**

## IMPEACHMENT BY FELONY CONVICTION-NON-DEFENDANT

**YOU HAVE HEARD THE TESTIMONY OF A WITNESS WHO WAS PREVIOUSLY CONVICTED OF A CRIME, PUNISHABLE BY MORE THAN ONE YEAR IN JAIL (OR INVOLVING DISHONESTY OR FALSE STATEMENT). THIS PRIOR CONVICTION WAS PUT INTO EVIDENCE FOR YOU TO CONSIDER IN EVALUATING THE WITNESS' CREDIBILITY. YOU MAY CONSIDER THE FACT THAT THE WITNESS WHO TESTIFIED IS A CONVICTED FELON IN DECIDING HOW MUCH OF HIS TESTIMONY TO ACCEPT AND WHAT WEIGHT, IF ANY, IT SHOULD BE GIVEN.**

## NUMBER OF WITNESSES AND UNCONTRADICTED TESTIMONY

**THE FACT THAT ONE SIDE OR THE OTHER CALLED MORE WITNESSES OR INTRODUCED MORE EVIDENCE DOES NOT MEAN THAT YOU SHOULD FIND THE FACTS IN FAVOR OF THE SIDE WHO CALLED MORE WITNESSES. YOU MUST NOT PERMIT THE NUMBER OF WITNESSES OR DOCUMENTS SUPPLIED OR THE AMOUNT OF TIME TAKEN IN EXAMINING A WITNESS TO OVERWHELM YOUR JUDGMENT. THE WEIGHT OF THE EVIDENCE IS BY NO MEANS DETERMINED BY THE NUMBER OF WITNESSES OR THE LENGTH OF THEIR TESTIMONY OR THE QUANTITY OF DOCUMENTS. YOU MUST KEEP IN MIND THAT THE BURDEN OF PROOF IS ALWAYS ON THE GOVERNMENT AND A DEFENDANT IS NOT REQUIRED TO CALL ANY WITNESS OR OFFER ANY EVIDENCE BECAUSE A DEFENDANT IS PRESUMED TO BE INNOCENT.**

BY THE SAME TOKEN, YOU DO NOT HAVE TO ACCEPT THE TESTIMONY OF ANY WITNESS WHO HAS NOT BEEN CONTRADICTED OR IMPEACHED IF YOU FIND THE WITNESS NOT TO BE CREDIBLE. TO UNDERSCORE WHAT I HAVE ALREADY TOLD YOU, IT IS YOUR FUNCTION AS JURORS TO DECIDE WHICH WITNESSES TO BELIEVE AND WHICH FACTS ARE TRUE. TO DO THIS, YOU MUST LOOK AT ALL THE EVIDENCE, DRAWING UPON YOUR OWN COMMON SENSE AND PERSONAL EXPERIENCE. BUT, AGAIN, YOU MUST KEEP IN MIND THAT THE BURDEN OF PROOF IS ALWAYS ON THE GOVERNMENT AND A DEFENDANT IS NOT REQUIRED TO CALL ANY WITNESSES OR OFFER ANY EVIDENCE BECAUSE HE IS PRESUMED TO BE INNOCENT.

## ALL AVAILABLE EVIDENCE NEED NOT BE PRODUCED

**THE LAW DOES NOT REQUIRE ANY PARTY TO CALL AS WITNESSES ALL PERSONS WHO MAY HAVE BEEN PRESENT AT ANY TIME OR PLACE INVOLVED IN THE CASE, OR WHO MAY APPEAR TO HAVE SOME KNOWLEDGE OF THE MATTER IN ISSUE AT THIS TRIAL. NOR DOES THE LAW REQUIRE ANY PARTY TO PRODUCE AS EXHIBITS ALL PAPERS AND THINGS MENTIONED DURING THE COURSE OF THE TRIAL. AND, OF COURSE, A DEFENDANT IN A CRIMINAL CASE IS NOT REQUIRED TO CALL ANY WITNESSES OR PRODUCE ANY EVIDENCE AT ALL.**

## INTERVIEWED WITNESSES

**DURING THE COURSE OF TRIAL, YOU HEARD TESTIMONY THAT ATTORNEYS INTERVIEWED WITNESSES WHEN PREPARING FOR AND DURING THE TRIAL. YOU MUST NOT DRAW ANY UNFAVORABLE INFERENCE FROM THAT FACT.**

**ON THE CONTRARY, ATTORNEYS ARE OBLIGED TO PREPARE THEIR CASE AS THOROUGHLY AS POSSIBLE, AND IN THE DISCHARGE OF THAT RESPONSIBILITY, PROPERLY INTERVIEW WITNESSES IN PREPARATION FOR THE TRIAL AND FROM TIME TO TIME AS MAY BE REQUIRED DURING THE COURSE OF TRIAL.**

## SPECIFIC INVESTIGATIVE TECHNIQUES NOT REQUIRED

**DURING THE TRIAL YOU HAVE HEARD ARGUMENT BY COUNSEL THAT THE GOVERNMENT DID NOT UTILIZE SPECIFIC INVESTIGATIVE TECHNIQUES OR EXHAUSTIVELY PURSUE EVERY PIECE OF INFORMATION. YOU MAY CONSIDER THESE FACTS IN DECIDING WHETHER THE GOVERNMENT HAS MET ITS BURDEN OF PROOF, BECAUSE, AS I TOLD YOU, YOU SHOULD LOOK AT ALL OF THE EVIDENCE OR LACK OF EVIDENCE IN DECIDING WHETHER THE GOVERNMENT HAS PROVEN A PARTICULAR CHARGE BEYOND A REASONABLE DOUBT.**

**HOWEVER, YOU ARE ALSO INSTRUCTED THAT THERE IS NO LEGAL REQUIREMENT THAT THE GOVERNMENT USE ANY SPECIFIC INVESTIGATIVE TECHNIQUES OR PURSUE EVERY INVESTIGATIVE LEAD TO PROVE ITS CASE. LAW ENFORCEMENT TECHNIQUES ARE NOT YOUR CONCERN.**

**YOUR CONCERN IS TO DETERMINE WHETHER OR NOT, BASED UPON ALL THE EVIDENCE PRESENTED IN THE CASE, THE GOVERNMENT HAS PROVEN THAT THE DEFENDANT IS GUILTY BEYOND A REASONABLE DOUBT.**

## GUILTY PLEAS OF OTHER INDIVIDUALS

**YOU HAVE HEARD TESTIMONY FROM WITNESSES WHO PLEADED GUILTY TO CHARGES ARISING OUT OF THE SAME FACTS AS THIS CASE. YOU ARE INSTRUCTED THAT YOU ARE TO DRAW NO CONCLUSIONS OR INFERENCES OF ANY KIND ABOUT THE GUILT OF THE DEFENDANT ON TRIAL FROM THE FACT THAT ANOTHER INDIVIDUAL PLEADED GUILTY TO SIMILAR OR RELATED CHARGES. THE DECISION TO PLEAD GUILTY WAS A PERSONAL DECISION ABOUT THAT INDIVIDUAL'S OWN GUILT. THE DECISION MAY NOT BE USED BY YOU IN ANY WAY AS EVIDENCE AGAINST THE DEFENDANT ON TRIAL.**

## COOPERATING WITNESSES

**IN THE ATTORNEYS' OPENING AND CLOSING ARGUMENTS, MUCH WAS SAID ABOUT THE "COOPERATING WITNESSES" AND ABOUT WHETHER OR NOT YOU SHOULD BELIEVE THEM. THE GOVERNMENT ARGUES, AS IT IS PERMITTED TO DO, THAT IT MUST TAKE THE WITNESSES AS IT FINDS THEM. IT ARGUES THAT ONLY PEOPLE WHO THEMSELVES TAKE PART IN CRIMINAL ACTIVITY HAVE THE KNOWLEDGE REQUIRED TO SHOW CRIMINAL BEHAVIOR BY OTHERS. FOR THOSE VERY REASONS, THE LAW ALLOWS THE USE OF ACCOMPLICE AND CO-CONSPIRATOR TESTIMONY. INDEED, IT IS THE LAW IN FEDERAL COURTS THAT THE TESTIMONY OF A SINGLE ACCOMPLICE OR CO-CONSPIRATOR MAY BE ENOUGH IN AND OF ITSELF TO SUSTAIN A CONVICTION, IF THE JURY FINDS THAT THE TESTIMONY ESTABLISHES GUILT BEYOND A REASONABLE DOUBT.**

**HOWEVER, IT IS ALSO THE CASE THAT COOPERATOR**

**TESTIMONY IS OF SUCH A NATURE THAT IT MUST BE SCRUTINIZED WITH GREAT CARE AND VIEWED WITH PARTICULAR CAUTION WHEN YOU DECIDE HOW MUCH OF THAT TESTIMONY, IF ANY, TO BELIEVE.**

**I HAVE GIVEN YOU SOME GENERAL CONSIDERATIONS ON CREDIBILITY, BUT RIGHT NOW, I WILL SAY A FEW THINGS THAT YOU MAY WANT TO CONSIDER DURING YOUR DELIBERATIONS ON THE SUBJECT OF COOPERATING WITNESSES. YOU SHOULD ASK YOURSELVES WHETHER THE WITNESSES WOULD BENEFIT MORE BY LYING OR BY TELLING THE TRUTH. WAS THE TESTIMONY MADE UP IN ANY WAY BECAUSE THE WITNESSES BELIEVED OR HOPED THAT THEY WOULD SOMEHOW RECEIVE FAVORABLE TREATMENT BY TESTIFYING FALSELY? OR DID THE WITNESSES BELIEVE THAT THEIR INTERESTS WOULD BE BEST SERVED BY TESTIFYING TRUTHFULLY? IF YOU BELIEVE THAT THE WITNESSES WERE MOTIVATED BY HOPES OF PERSONAL**

**GAIN, WAS THIS MOTIVATION ONE THAT WOULD CAUSE THEM TO LIE, OR WAS IT ONE THAT WOULD CAUSE THEM TO TELL THE TRUTH? DID THIS MOTIVATION COLOR THEIR TESTIMONY AT ALL?**

**YOU HAVE ALSO HEARD TESTIMONY THAT THE COOPERATING WITNESSES HAVE BEEN PROMISED THAT IF THE GOVERNMENT DETERMINES THAT THE COOPERATING WITNESS HAS COOPERATED FULLY, PROVIDED SUBSTANTIAL ASSISTANCE TO LAW ENFORCEMENT AUTHORITIES, TESTIFIED TRUTHFULLY, AND OTHERWISE COMPLIED WITH THE TERMS OF THE COOPERATION AGREEMENT, THE GOVERNMENT WILL PRESENT TO THE SENTENCING COURT WHAT IS CALLED A 5K1.1 LETTER, OR A "5K LETTER." THE 5K LETTER SETS FORTH THE COOPERATING WITNESS'S CRIMINAL ACTS AS WELL AS THE SUBSTANTIAL ASSISTANCE THE WITNESS HAS PROVIDED. I INSTRUCT YOU THAT THE 5K LETTER DOES NOT GUARANTEE THE COOPERATING WITNESS A**

**LOWER SENTENCE. THIS IS BECAUSE THE SENTENCING COURT MAY, BUT IS NOT REQUIRED TO, TAKE THE 5K LETTER INTO ACCOUNT WHEN IMPOSING SENTENCE ON THE COOPERATING WITNESS. THUS, WHILE THE DECISION REGARDING WHETHER TO WRITE THE 5K LETTER RESTS WITH THE GOVERNMENT, THE FINAL DETERMINATION AS TO THE SENTENCE TO BE IMPOSED RESTS WITH THE COURT. ULTIMATELY, YOU SHOULD LOOK AT ALL OF THE EVIDENCE IN DECIDING WHAT CREDENCE AND WHAT WEIGHT YOU GIVE TO THE COOPERATING WITNESSES.**

## OTHER INDIVIDUALS NOT ON TRIAL

**IN ADDITION TO THE EVIDENCE ABOUT THE INVOLVEMENT OF COOPERATING ACCOMPLICES WHO TESTIFIED AT TRIAL, EVIDENCE HAS ALSO BEEN INTRODUCED AS TO THE INVOLVEMENT OF CERTAIN OTHER INDIVIDUALS IN THE CRIMES CHARGED IN THE INDICTMENT. YOU MAY NOT DRAW ANY INFERENCE, FAVORABLE OR UNFAVORABLE, TOWARD THE GOVERNMENT OR A DEFENDANT ON TRIAL FROM THE FACT THAT CERTAIN PERSONS WERE NOT NAMED AS DEFENDANTS IN THIS INDICTMENT. YOU SHOULD DRAW NO INFERENCE FROM THE FACT THAT ANY OTHER PERSON IS NOT PRESENT AT THIS TRIAL. YOUR CONCERN IS SOLELY THE DEFENDANT ON TRIAL BEFORE YOU.**

**THAT OTHER INDIVIDUALS ARE NOT ON TRIAL BEFORE YOU IS NOT A MATTER OF CONCERN TO YOU. YOU SHOULD NOT SPECULATE AS TO THE REASONS THESE INDIVIDUALS ARE NOT ON TRIAL BEFORE YOU. THE FACT**

**THAT THESE INDIVIDUALS ARE NOT ON TRIAL BEFORE YOU SHOULD NOT CONTROL OR INFLUENCE YOUR VERDICT WITH REFERENCE TO A DEFENDANT WHO IS ON TRIAL. YOU MUST ONLY CONSIDER WHETHER THE GOVERNMENT HAS PROVED, BEYOND A REASONABLE DOUBT, THAT A DEFENDANT IS GUILTY OF A CRIME. THE FACT THAT THESE INDIVIDUALS ARE NOT ON TRIAL BEFORE YOU SHOULD NOT CONTROL OR INFLUENCE IN ANY WAY YOUR VERDICT WITH REFERENCE TO THE DEFENDANT.**

**<u>LAW ENFORCEMENT EMPLOYEE TESTIMONY</u>**

**DURING THIS TRIAL, YOU HAVE HEARD THE**

TESTIMONY OF AN ACTIVE OR RETIRED LAW ENFORCEMENT EMPLOYEE. THE FACT THAT A WITNESS IS A LAW ENFORCEMENT EMPLOYEE DOES NOT MEAN THAT HIS TESTIMONY IS ENTITLED TO ANY GREATER WEIGHT. BY THE SAME TOKEN, THE TESTIMONY OF SUCH A WITNESS IS NOT ENTITLED TO LESS CONSIDERATION FOR THAT REASON.

AT THE SAME TIME, IT IS QUITE LEGITIMATE FOR DEFENSE COUNSEL TO TRY TO QUESTION THE CREDIBILITY OF A LAW ENFORCEMENT WITNESS ON THE GROUNDS THAT HIS TESTIMONY MAY BE COLORED BY A PERSONAL OR PROFESSIONAL INTEREST IN THE OUTCOME OF THE CASE.

YOU SHOULD CONSIDER THE TESTIMONY OF A LAW ENFORCEMENT EMPLOYEE JUST AS YOU WOULD ANY OTHER EVIDENCE IN THE CASE AND EVALUATE HIS CREDIBILITY JUST AS YOU WOULD THAT OF ANY OTHER WITNESS. AFTER REVIEWING ALL THE EVIDENCE, YOU

**WILL DECIDE WHETHER TO ACCEPT THE TESTIMONY OF A LAW ENFORCEMENT EMPLOYEE AND WHAT WEIGHT, IF ANY, THAT TESTIMONY DESERVES.**

## EXPERT TESTIMONY

**THE RULES OF EVIDENCE ORDINARILY DO NOT PERMIT WITNESSES TO STATE THEIR OWN OPINIONS ABOUT IMPORTANT QUESTIONS IN A TRIAL, BUT THERE ARE EXCEPTIONS TO THESE RULES.**

**IN THIS CASE, YOU HEARD TESTIMONY FROM DARRYL VALINCHUS. BECAUSE OF HIS KNOWLEDGE, SKILL, EXPERIENCE, TRAINING, OR EDUCATION IN THE FIELD OF COMMUNICATIONS ANALYSIS AND GEOSPATIAL VISUALIZATION OF CELLULAR PHONE LOCATION DATA, MR. VALINCHUS WAS PERMITTED TO OFFER OPINIONS IN THAT FIELD AND THE REASONS FOR THOSE OPINIONS.**

**THE OPINIONS THIS WITNESS STATES SHOULD RECEIVE WHATEVER WEIGHT YOU THINK APPROPRIATE, GIVEN ALL THE OTHER EVIDENCE IN THE CASE. IN WEIGHING THIS OPINION TESTIMONY YOU MAY CONSIDER THE WITNESS' QUALIFICATIONS, THE REASONS**

**FOR THE WITNESS' OPINIONS, AND THE RELIABILITY OF THE INFORMATION SUPPORTING THE WITNESS' OPINIONS, AS WELL AS THE OTHER FACTORS DISCUSSED IN THESE INSTRUCTIONS FOR WEIGHING THE TESTIMONY OF WITNESSES. YOU MAY DISREGARD THE OPINIONS ENTIRELY IF YOU DECIDE THAT MR. VALINCHUS'S OPINIONS ARE NOT BASED ON SUFFICIENT KNOWLEDGE, SKILL, EXPERIENCE, TRAINING, OR EDUCATION. YOU MAY ALSO DISREGARD THE OPINIONS IF YOU CONCLUDE THAT THE REASONS GIVEN IN SUPPORT OF THE OPINIONS ARE NOT SOUND, OR IF YOU CONCLUDE THAT THE OPINIONS ARE NOT SUPPORTED BY THE FACTS SHOWN BY THE EVIDENCE, OR IF YOU THINK THAT THE OPINIONS ARE OUTWEIGHED BY OTHER EVIDENCE.**

## [IF APPLICABLE] DEFENDANT'S RIGHT NOT TO TESTIFY

**THE DEFENDANT CHOSE NOT TO TESTIFY IN THIS CASE. UNDER OUR CONSTITUTION, A DEFENDANT HAS NO OBLIGATION TO TESTIFY OR TO PRESENT ANY OTHER EVIDENCE BECAUSE IT IS THE PROSECUTION'S BURDEN TO PROVE A DEFENDANT GUILTY BEYOND A REASONABLE DOUBT. THAT BURDEN REMAINS WITH THE PROSECUTION THROUGHOUT THE ENTIRE TRIAL AND NEVER SHIFTS TO A DEFENDANT. A DEFENDANT IS NEVER REQUIRED TO PROVE THAT HE IS INNOCENT.**

**YOU MAY NOT ATTACH ANY SIGNIFICANCE TO THE FACT THAT THE DEFENDANT DID NOT TESTIFY. NO ADVERSE INFERENCE AGAINST THE DEFENDANT MAY BE DRAWN BY YOU BECAUSE HE DID NOT TAKE THE WITNESS STAND. YOU MAY NOT CONSIDER THIS AGAINST THE DEFENDANT IN ANY WAY IN YOUR DELIBERATIONS IN THE JURY ROOM.**

## [IF APPLICABLE] DEFENDANT'S DECISION TO TESTIFY

**THE DEFENDANT HAS TESTIFIED. YOU SHOULD TREAT THIS TESTIMONY JUST AS YOU WOULD THE TESTIMONY OF ANY OTHER WITNESS.**

## CHARTS AND SUMMARIES

**EXHIBITS HAVE BEEN PRESENTED IN THIS CASE IN THE FORM OF CHARTS AND SUMMARIES. THESE CHARTS AND SUMMARIES WERE SHOWN TO YOU IN ORDER TO MAKE THE OTHER EVIDENCE MORE MEANINGFUL AND TO AID YOU IN CONSIDERING THE EVIDENCE. THEY ARE NO BETTER THAN THE DOCUMENTS UPON WHICH THEY ARE BASED, AND ARE NOT THEMSELVES INDEPENDENT EVIDENCE. THEREFORE, YOU ARE TO GIVE NO GREATER CONSIDERATION TO THESE CHARTS, SCHEDULES OR SUMMARIES THAN YOU WOULD GIVE TO THE EVIDENCE UPON WHICH THEY ARE BASED. IT IS FOR YOU TO DECIDE WHETHER THE CHARTS, SCHEDULES OR SUMMARIES CORRECTLY PRESENT THE INFORMATION CONTAINED IN THE TESTIMONY AND IN THE EXHIBITS ON WHICH THEY ARE BASED. YOU ARE ENTITLED TO CONSIDER THE CHARTS, SCHEDULES, AND SUMMARIES IF YOU FIND THAT THEY ARE OF ASSISTANCE TO YOU IN ANALYZING AND**

## UNDERSTANDING THE EVIDENCE.

## UNCHARGED ACTS CONSIDERED FOR A LIMITED PURPOSE

**YOU HAVE HEARD EVIDENCE THAT THE DEFENDANT ENGAGED IN CONDUCT OTHER THAN THE CRIMES CHARGED IN THE INDICTMENT. THE DEFENDANT IS NOT ON TRIAL FOR COMMITTING ANY ACTS NOT CHARGED IN THE INDICTMENT OR FOR ACTS COMMITTED OUTSIDE THE TIME PERIODS CHARGED IN EACH COUNT OF THE INDICTMENT. CONSEQUENTLY, YOU MAY NOT CONSIDER EVIDENCE OF THOSE OTHER ACTS AS A SUBSTITUTE FOR EVIDENCE THAT THE DEFENDANT COMMITTED THE CRIMES CHARGED IN THIS CASE. NOR MAY YOU CONSIDER EVIDENCE OF THOSE OTHER ACTS AS PROOF THAT THE DEFENDANT HAS A CRIMINAL PROPENSITY; THAT IS, YOU MAY NOT CONCLUDE THAT HE LIKELY**

**COMMITTED THE CRIMES CHARGED IN THE INDICTMENT BECAUSE HE WAS PREDISPOSED TO CRIMINAL CONDUCT.**

**INSTEAD, YOU MAY CONSIDER EVIDENCE OF UNCHARGED CONDUCT BY THE DEFENDANT FOR LIMITED PURPOSES, AND YOU MAY CONSIDER IT ONLY FOR THE FOLLOWING LIMITED PURPOSES, WHICH I WILL NOW DESCRIBE. YOU MAY ONLY CONSIDER EVIDENCE OF UNCHARGED CONDUCT:**

- **AS EVIDENCE OF CONDUCT THAT IS INEXTRICABLY INTERTWINED WITH EVIDENCE OF THE CHARGED CRIMES;**

- **AS EVIDENCE ENABLING YOU TO UNDERSTAND THE COMPLETE STORY OF THE CHARGED CRIMES; AND**

- **AS EVIDENCE CORROBORATING THE TESTIMONY OF OTHER GOVERNMENT WITNESSES.**

**EVIDENCE OF UNCHARGED CONDUCT BY THE DEFENDANT MAY NOT BE CONSIDERED BY YOU FOR ANY PURPOSE OTHER THAN THE ONES I HAVE JUST LISTED.**

## II. LEGAL ELEMENTS OF THE CRIME CHARGED

### INTRODUCTION TO INDICTMENT

**I WILL NOW TURN TO THE SECOND PART OF THIS CHARGE—AND WILL, AS I INDICATED AT THE OUTSET, INSTRUCT YOU AS TO THE SPECIFIC ELEMENTS OF THE CRIMES CHARGED THAT THE GOVERNMENT MUST PROVE BEYOND A REASONABLE DOUBT TO WARRANT A FINDING OF GUILT IN THIS CASE.**

**THE DEFENDANT IS FORMALLY CHARGED IN AN INDICTMENT. AS I INSTRUCTED YOU AT THE BEGINNING OF THIS CASE, AN INDICTMENT IS A CHARGE OR ACCUSATION. IT IS NOT EVIDENCE. THE INDICTMENT IN THIS CASE CONTAINS TWO COUNTS.**

**EACH COUNT OF THE INDICTMENT CHARGES THE DEFENDANT WITH A DIFFERENT CRIME.**

**YOU MUST, AS A MATTER OF LAW, CONSIDER EACH COUNT OF THE INDICTMENT SEPARATELY, AND YOU**

**MUST RETURN A SEPARATE VERDICT FOR EACH COUNT ON WHICH HE IS CHARGED.**

**TO REPEAT, AN INDICTMENT IS MERELY AN ACCUSATION IN WRITING. IT IS NOT EVIDENCE OF GUILT. IT IS ENTITLED TO NO WEIGHT IN YOUR DETERMINATION OF THE FACTS. THE DEFENDANT HAS PLEADED NOT GUILTY, THEREBY PLACING IN ISSUE EACH ALLEGATION IN THE INDICTMENT.**

## VENUE

**THE INDICTMENT ALLEGES THE CRIMES CHARGED OCCURRED IN PART IN THIS JUDICIAL DISTRICT, THE EASTERN DISTRICT OF NEW YORK. YOU MUST CONSIDER WHETHER ANY ACT IN FURTHERANCE OF EACH OF THE CRIMES CHARGED OCCURRED WITHIN THE EASTERN DISTRICT OF NEW YORK. YOU ARE INSTRUCTED THAT THE EASTERN DISTRICT OF NEW YORK ENCOMPASSES KINGS, QUEENS, RICHMOND, NASSAU, AND SUFFOLK COUNTIES. BROOKLYN IS IN KINGS COUNTY. STATEN ISLAND IS IN RICHMOND COUNTY. THE EASTERN DISTRICT OF NEW YORK ENCOMPASSES THE BOROUGHS OF BROOKLYN, QUEENS, AND STATEN ISLAND, AS WELL AS NASSAU AND SUFFOLK COUNTIES ON LONG ISLAND.**

## DATES APPROXIMATE

**THE INDICTMENT CHARGES "ON OR ABOUT" CERTAIN DATES. IT DOES NOT MATTER IF THE INDICTMENT CHARGES THAT A SPECIFIC ACT OCCURRED ON OR ABOUT A CERTAIN DATE, AND THE EVIDENCE INDICATES THAT, IN FACT, IT WAS ON ANOTHER DATE. THE LAW ONLY REQUIRES SUBSTANTIAL SIMILARITY BETWEEN THE DATES ALLEGED IN THE INDICTMENT AND THE DATES ESTABLISHED BY TESTIMONY OR EXHIBITS.**

## USE OF CONJUNCTIVE AND DISJUNCTIVE IN INDICTMENT

**ONE OR MORE COUNTS OF THE INDICTMENT MAY ACCUSE A DEFENDANT OF VIOLATING THE SAME STATUTE IN MORE THAN ONE WAY. IN OTHER WORDS, THE INDICTMENT MAY ALLEGE THAT THE STATUTE IN QUESTION WAS VIOLATED BY VARIOUS ACTS WHICH ARE IN THE INDICTMENT JOINED BY THE CONJUNCTIVE WORD "AND," WHILE THE STATUTE AND THE ELEMENTS OF THE OFFENSE ARE STATED IN THE DISJUNCTIVE, USING THE WORD "OR." IN THESE INSTANCES, IT IS SUFFICIENT FOR A FINDING OF GUILT IF THE EVIDENCE ESTABLISHED BEYOND A REASONABLE DOUBT THE VIOLATION OF THE STATUTE BY ANY ONE OF THE ACTS CHARGED.**

## KNOWINGLY, WILLFULLY, AND INTENTIONALLY

**DURING THESE INSTRUCTIONS ON THE ELEMENTS OF THE CRIMES CHARGED, YOU WILL HEAR ME USE THE**

**WORDS "KNOWINGLY," "WILLFULLY," AND "INTENTIONALLY" FROM TIME TO TIME. WHAT DO THESE WORDS MEAN WHEN USED IN AN INDICTMENT?**

**A PERSON ACTS "KNOWINGLY" IF HE ACTS INTENTIONALLY AND VOLUNTARILY AND NOT BECAUSE OF IGNORANCE, MISTAKE, ACCIDENT, OR CARELESSNESS. WHETHER A DEFENDANT ACTED KNOWINGLY MAY BE PROVEN BY HIS CONDUCT AND BY ALL OF THE FACTS AND CIRCUMSTANCES SURROUNDING THE CASE.**

**A PERSON ACTS "WILLFULLY" IF HE ACTS KNOWINGLY AND PURPOSEFULLY, WITH AN INTENT TO DO SOMETHING THE LAW FORBIDS; THAT IS TO SAY, WITH A BAD PURPOSE EITHER TO DISOBEY OR TO DISREGARD THE LAW. HOWEVER, THE GOVERNMENT NEED NOT PROVE THAT A DEFENDANT KNEW THAT HE WAS BREAKING ANY PARTICULAR LAW OR ANY PARTICULAR RULE OR WAS AWARE OF ANY PARTICULAR LAW OR PARTICULAR RULE. THE GOVERNMENT MUST ONLY**

**SHOW THAT A DEFENDANT WAS AWARE OF THE GENERALLY UNLAWFUL NATURE OF HIS ACTS.**

**A PERSON ACTS "INTENTIONALLY" IF HE ACTS DELIBERATELY AND PURPOSEFULLY. THAT IS, THE ACTS MUST HAVE BEEN THE PRODUCT OF HIS CONSCIOUS, OBJECTIVE DECISION RATHER THAN THE PRODUCT OF A MISTAKE OR ACCIDENT.**

**THESE ISSUES OF KNOWLEDGE, WILLFULNESS, AND INTENT REQUIRE YOU TO MAKE A DETERMINATION ABOUT A DEFENDANT'S STATE OF MIND, SOMETHING THAT CAN RARELY BE PROVEN DIRECTLY. A WISE AND CAREFUL CONSIDERATION OF ALL THE CIRCUMSTANCES BEFORE YOU MAY, HOWEVER, PERMIT YOU TO MAKE A DETERMINATION AS TO A DEFENDANT'S STATE OF MIND. INDEED, IN YOUR EVERYDAY AFFAIRS, YOU ARE FREQUENTLY CALLED UPON TO DETERMINE A PERSON'S STATE OF MIND FROM HIS WORDS AND ACTIONS IN GIVEN CIRCUMSTANCES. YOU ARE ASKED TO DO THE SAME**

**HERE.**

**COUNT ONE: OBSTRUCTION OF JUSTICE**

**COUNT ONE CHARGES THE DEFENDANT WITH OBSTRUCTING JUSTICE IN OR ABOUT JANUARY 2020. THE INDICTMENT READS AS FOLLOWS:**

> **IN OR ABOUT JANUARY 2020, WITHIN THE EASTERN DISTRICT OF NEW YORK AND ELSEWHERE, THE DEFENDANT HECTOR ROSARIO, TOGETHER WITH OTHERS, DID KNOWINGLY, INTENTIONALLY AND CORRUPTLY OBSTRUCT AND IMPEDE, AND ATTEMPT TO OBSTRUCT AND IMPEDE, AN OFFICIAL PROCEEDING, TO WIT: A FEDERAL GRAND JURY INVESTIGATION IN THE EASTERN DISTRICT OF NEW YORK.**

**THE RELEVANT STATUTE PROVIDES, IN RELEVANT PART: "WHOEVER CORRUPTLY … OBSTRUCTS, INFLUENCES, OR IMPEDES ANY OFFICIAL PROCEEDING,**

**OR ATTEMPTS TO DO SO [IS GUILTY OF A CRIME]."**

**TO PROVE THIS CRIME, THE GOVERNMENT MUST PROVE BEYOND A REASONABLE DOUBT THE FOLLOWING FOUR ELEMENTS:**

**FIRST, THE DEFENDANT OBSTRUCTED, INFLUENCED OR IMPEDED AN OFFICIAL PROCEEDING, OR ATTEMPTED TO DO SO;**

**SECOND, IN THE COURSE OF DOING SO, THE DEFENDANT COMMITTED OR ATTEMPTED TO COMMIT AN ACT THAT IMPAIRED THE INTEGRITY OR RENDERED UNAVAILABLE RECORDS, DOCUMENTS, OBJECTS, OR OTHER THINGS FOR USE IN THE OFFICIAL PROCEEDING;**

**THIRD, THE DEFENDANT INTENDED TO IMPAIR THE INTEGRITY OF OR RENDER UNAVAILABLE SUCH RECORDS, DOCUMENTS, OBJECTS, OR OTHER THINGS FOR USE IN THE OFFICIAL PROCEEDING; AND**

**FOURTH, THE DEFENDANT ACTED CORRUPTLY.**

**THE FIRST ELEMENT: OBSTRUCTING AN OFFICIAL PROCEEDING**

**THE FIRST ELEMENT THE GOVERNMENT MUST PROVE BEYOND A REASONABLE DOUBT IS THAT THE DEFENDANT OBSTRUCTED, INFLUENCED OR IMPEDED AN OFFICIAL PROCEEDING, OR ATTEMPTED TO DO SO.**

**AN OFFICIAL PROCEEDING MEANS A PROCEEDING BEFORE A COURT, JUDGE OR FEDERAL AGENCY. THE PROCEEDINGS MAY BE CRIMINAL OR CIVIL. YOU ARE INSTRUCTED THAT A FEDERAL GRAND JURY INVESTIGATION IS AN OFFICIAL PROCEEDING.**

**THE LAW DOES NOT REQUIRE THAT THE FEDERAL PROCEEDING BE PENDING AT THE TIME OF THE DEFENDANT'S ACTIONS AS LONG AS THE PROCEEDING WAS FORESEEABLE, SUCH THAT THE DEFENDANT KNEW THAT HIS ACTIONS WERE LIKELY TO AFFECT THE PROCEEDING. IN ADDITION, THE GOVERNMENT DOES NOT HAVE TO PROVE THAT THE DEFENDANT KNEW THAT**

**PROCEEDING WOULD SPECIFICALLY BE A FEDERAL GRAND JURY PROCEEDING.**

**<u>THE SECOND ELEMENT: IMPAIRING THE INTEGRITY OR AVAILABILITY OF THINGS FOR USE IN OFFICIAL PROCEEDING</u>**

**THE SECOND ELEMENT THE GOVERNMENT MUST PROVE BEYOND A REASONABLE DOUBT IS THAT THE DEFENDANT IMPAIRED THE INTEGRITY OR RENDERED UNAVAILABLE RECORDS, DOCUMENTS, OBJECTS, OR OTHER THINGS FOR USE IN THE OFFICIAL PROCEEDING, OR ATTEMPTED TO DO SO.**

**"OTHER THINGS" INCLUDES WITNESS TESTIMONY AND OTHER INTANGIBLE INFORMATION THAT COULD BE USED IN AN OFFICIAL PROCEEDING.**

**THUS, IF THE GOVERNMENT PROVES BEYOND A REASONABLE DOUBT THAT THE DEFENDANT IMPAIRED THE AVAILABILITY OR INTEGRITY OF WITNESS TESTIMONY, RECORDS, DOCUMENTS, OBJECTS, OR OTHER**

**INTANGIBLE INFORMATION, FROM ITS USE IN A FEDERAL GRAND JURY INVESTIGATION, OR ATTEMPTED TO DO SO, THIS ELEMENT IS SATISFIED.**

**THE THIRD ELEMENT: INTENT**

**THE THIRD ELEMENT THE GOVERNMENT MUST PROVE BEYOND A REASONABLE DOUBT IS THAT THE DEFENDANT ACTED WITH THE INTENT TO IMPAIR THE INTEGRITY OR RENDER UNAVAILABLE EVIDENCE OR OTHER THINGS FOR USE IN THE OFFICIAL PROCEEDING. I HAVE ALREADY DEFINED INTENT FOR YOU, AND INSTRUCT YOU TO APPLY THAT DEFINITION HERE.**

**THE LAW DOES NOT REQUIRE THAT THE DEFENDANT'S ACTIONS SUCCEEDED IN ACTUALLY IMPEDING OR OBSTRUCTING JUSTICE. IN OTHER WORDS, THIS ELEMENT IS SATISFIED IF THE GOVERNMENT PROVES BEYOND A REASONABLE DOUBT THAT THE DEFENDANT ACTED WITH INTENT TO IMPAIR THE INTEGRITY OR RENDER UNAVAILABLE EVIDENCE OR**

**OTHER THINGS FOR USE IN THE OFFICIAL PROCEEDING, REGARDLESS OF WHETHER THE DEFENDANT SUCCEEDS IN INTERFERING WITH AN OFFICIAL PROCEEDING.**

**DIRECT PROOF OF A DEFENDANT'S INTENT IS ALMOST NEVER AVAILABLE. IT WOULD BE A RARE CASE WHERE IT COULD BE SHOWN THAT A PERSON WROTE OR STATED THAT, AS OF A GIVEN TIME, HE COMMITTED AN ACT WITH A PARTICULAR INTENT. SUCH DIRECT PROOF IS NOT REQUIRED; INTENT CAN BE INFERRED FROM CIRCUMSTANTIAL EVIDENCE. YOU MAY, BUT ARE NOT REQUIRED, TO INFER THAT A PERSON INTENDS THE NATURAL AND PROBABLE CONSEQUENCES OF ACTIONS KNOWINGLY DONE. IN ORDER TO SATISFY THE INTENT ELEMENT, IT IS NOT NECESSARY FOR THE GOVERNMENT TO PROVE THAT THE DEFENDANT KNEW THAT HE WAS BREAKING ANY PARTICULAR LAW. NOR IS IT NECESSARY FOR THE GOVERNMENT TO DISPROVE THAT THE DEFENDANT MIGHT HAVE HAD OTHER REASONS FOR HIS**

**ACTIONS. THE INTENT TO IMPAIR THE INTEGRITY OF OR RENDER UNAVAILABLE EVIDENCE OR OTHER THINGS FOR USE IN AN OFFICIAL PROCEEDING NEED NOT HAVE BEEN THE ONLY REASON, SO LONG AS IT WAS A SUBSTANTIAL MOTIVATING FACTOR BEHIND THE DEFENDANT'S ACTIONS**

**<u>THE FOURTH ELEMENT: DEFENDANT ACTED CORRUPTLY</u>**

**THE FOURTH ELEMENT THE GOVERNMENT MUST PROVE BEYOND A REASONABLE DOUBT IS THAT THE DEFENDANT ACTED CORRUPTLY.**

**TO ACT CORRUPTLY MEANS TO ACT WITH AN IMPROPER PURPOSE AND TO ENGAGE IN CONDUCT KNOWINGLY AND DISHONESTLY WITH THE INTENT TO OBSTRUCT, IMPEDE OR INFLUENCE THE DUE ADMINISTRATION OF JUSTICE.**

**THE DUE ADMINISTRATION OF JUSTICE REFERS TO THE FAIR, IMPARTIAL, UNCORRUPTED AND UNIMPEDED**

**INVESTIGATION, PROSECUTION DISPOSITION OR TRIAL OF ANY MATTER, CIVIL OR CRIMINAL IN THE COURTS OF THE UNITED STATES. THIS INCLUDES FEDERAL GRAND JURY PROCEEDINGS.**

## ATTEMPT

**COUNT ONE OF THE INDICTMENT ALSO CHARGES THE DEFENDANT WITH ATTEMPTING TO OBSTRUCT JUSTICE. AS A RESULT, WITH RESPECT TO COUNT ONE, THE GOVERNMENT MAY ALSO SATISFY ITS BURDEN OF PROOF BY DEMONSTRATING THAT THE DEFENDANT ATTEMPTED TO COMMIT THE CHARGED CRIME.**

**TO PROVE THAT THE DEFENDANT ATTEMPTED TO COMMIT A CRIME, THE GOVERNMENT MUST PROVE THE FOLLOWING TWO ELEMENTS BEYOND A REASONABLE DOUBT:**

**FIRST, THE GOVERNMENT MUST PROVE THAT THE DEFENDANT INTENDED TO COMMIT THE**

**CRIME AS CHARGED IN COUNT ONE, THE ELEMENTS OF WHICH I HAVE EXPLAINED TO YOU.**

**SECOND, THE GOVERNMENT MUST PROVE THAT THE DEFENDANT WILLFULLY TOOK SOME**

**ACTION THAT WAS A SUBSTANTIAL STEP IN AN EFFORT TO BRING ABOUT OR ACCOMPLISH THE CRIME.**

**I HAVE ALREADY DEFINED WHAT IT MEANS TO ACT WILLFULLY, AND INSTRUCT YOU TO USE THAT DEFINITION HERE.**

**THE MERE INTENT TO COMMIT A SPECIFIC CRIME, BY ITSELF, DOES NOT CONSTITUTE AN ATTEMPT. IN ORDER FOR YOU TO FIND THE DEFENDANT GUILTY OF AN ATTEMPT TO COMMIT THE CRIME CHARGED IN COUNT ONE, THE GOVERNMENT MUST PROVE, BEYOND A REASONABLE DOUBT, THAT THE DEFENDANT INTENDED TO COMMIT THE CRIME CHARGED, AND THAT HE TOOK SOME SUBSTANTIAL STEP TOWARD THE COMMISSION OF THE INTENDED CRIME.**

**IN DETERMINING WHETHER THE DEFENDANT'S ACTIONS AMOUNTED TO A SUBSTANTIAL STEP TOWARD THE COMMISSION OF THE CRIME, IT IS NECESSARY TO DISTINGUISH BETWEEN MERE PREPARATION ON THE ONE HAND, AND ACTUALLY DOING A CRIMINAL DEED ON THE OTHER. MERE PREPARATION, WHICH MAY CONSIST OF PLANNING THE OFFENSE, OR THE DEVISING, OBTAINING OR ARRANGING A MEANS FOR ITS COMMISSION, IS NOT AN ATTEMPT, ALTHOUGH SOME PREPARATIONS MAY AMOUNT TO AN ATTEMPT. THE ACTS OF A PERSON WHO INTENDS TO COMMIT A CRIME WILL CONSTITUTE AN ATTEMPT WHEN THE ACTS THEMSELVES CLEARLY INDICATE INTENT TO COMMIT THE CRIME, AND THE ACTS ARE A SUBSTANTIAL STEP IN A COURSE OF CONDUCT PLANNED TO CULMINATE IN THE COMMISSION OF THE CRIME.**

**COUNT TWO: MAKING FALSE STATEMENTS**

**COUNT TWO OF THE INDICTMENT CHARGES THE DEFENDANT WITH KNOWINGLY AND WILLFULLY MAKING FALSE STATEMENTS TO SPECIAL AGENTS OF THE FEDERAL BUREAU OF INVESTIGATION ("FBI") ON OR ABOUT JANUARY 27, 2020. COUNT TWO READS AS FOLLOWS:**

> **ON OR ABOUT JANUARY 27, 2020, WITHIN THE EASTERN DISTRICT OF NEW YORK AND ELSEWHERE, THE DEFENDANT HECTOR ROSARIO DID KNOWINGLY AND WILLFULLY MAKE ONE OR MORE MATERIALLY FALSE, FICTITIOUS AND FRAUDULENT STATEMENTS AND REPRESENTATIONS IN A MATTER WITHIN THE JURISDICTION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT OF THE UNITED STATES, TO WIT: THE FEDERAL BUREAU OF INVESTIGATION ("FBI"), IN THAT THE DEFENDANT FALSELY**

**STATED TO SPECIAL AGENTS OF THE FBI THAT (A) HE DID NOT KNOW THE IDENTITY OF JOHN DOE, AN INDIVIDUAL WHOSE IDENTITY IS KNOWN TO THE GRAND JURY, AND (B) HE WAS NOT FAMILIAR WITH THE GAMBLING BUSINESS KNOWN AS "SAL'S SHOE REPAIR" LOCATED IN AND AROUND 41 MERRICK AVENUE IN MERRICK, NEW YORK, WHEN, IN FACT, AS ROSARIO THEN AND THERE WELL KNEW AND BELIEVED, HE DID KNOW THE IDENTITY OF JOHN DOE AND WAS FAMILIAR WITH THAT GAMBLING BUSINESS.**

**THE RELEVANT STATUTE PROVIDES, IN PERTINENT PART: ". . . WHOEVER, IN ANY MATTER WITHIN THE JURISDICTION OF THE EXECUTIVE, . . . BRANCH OF THE GOVERNMENT OF THE UNITED STATES, KNOWINGLY AND WILLFULLY . . . MAKES ANY MATERIALLY FALSE,**

**FICTITIOUS OR FRAUDULENT STATEMENT OR REPRESENTATIONS . . . SHALL BE [GUILTY OF A CRIME]."**

**TO PROVE A DEFENDANT GUILTY OF MAKING MATERIALLY FALSE STATEMENTS, THE GOVERNMENT MUST PROVE EACH OF THE FOLLOWING ELEMENTS BEYOND A REASONABLE DOUBT:**

**FIRST, ON OR ABOUT THE DATE SPECIFIED, THE DEFENDANT MADE A STATEMENT OR REPRESENTATION;**

**SECOND, THE STATEMENT OR REPRESENTATION WAS MATERIAL;**

**THIRD, THE STATEMENT OR REPRESENTATION WAS FALSE, FICTITIOUS OR FRAUDULENT;**

**FOURTH, THE FALSE, FICTITIOUS OR FRAUDULENT STATEMENT OR REPRESENTATION WAS MADE KNOWINGLY AND WILLFULLY; AND**

**FIFTH, THE STATEMENT OR REPRESENTATION WAS MADE WITH RESPECT TO A MATTER WITHIN THE JURISDICTION OF THE GOVERNMENT OF THE UNITED**

**STATES.**

**I WILL EXPLAIN EACH OF THESE ELEMENTS TO YOU IN MORE DETAIL.**

**<u>FIRST ELEMENT: THE DEFENDANT MADE A STATEMENT OR REPRESENTATION</u>**

**THE FIRST ELEMENT THAT THE GOVERNMENT MUST PROVE BEYOND A REASONABLE DOUBT IS THAT THE DEFENDANT MADE A STATEMENT OR REPRESENTATION.**

**<u>SECOND ELEMENT: MATERIALITY</u>**

**THE SECOND ELEMENT THE GOVERNMENT MUST PROVE BEYOND A REASONABLE DOUBT IS THAT THE DEFENDANT'S STATEMENT OR REPRESENTATION WAS MATERIAL.**

**A FACT IS MATERIAL IF IT WAS CAPABLE OF INFLUENCING THE GOVERNMENT'S DECISIONS OR ACTIVITIES. HOWEVER, PROOF OF ACTUAL RELIANCE ON THE STATEMENT BY THE GOVERNMENT IS NOT REQUIRED.**

**THIRD ELEMENT: FALSE FICTITIOUS OR FRAUDULENT STATEMENT**

**THE THIRD ELEMENT THAT THE GOVERNMENT MUST PROVE BEYOND A REASONABLE DOUBT IS THAT THE STATEMENT OR REPRESENTATION WAS FALSE, FICTITIOUS OR FRAUDULENT. A STATEMENT OR REPRESENTATION IS "FALSE" OR "FICTITIOUS" IF IT WAS UNTRUE WHEN MADE AND KNOWN AT THE TIME TO BE UNTRUE BY THE PERSON MAKING IT OR CAUSING IT TO BE MADE. A STATEMENT OR REPRESENTATION IS "FRAUDULENT" IF IT WAS UNTRUE WHEN MADE AND WAS MADE OR CAUSED TO BE MADE WITH THE INTENT TO DECEIVE THE GOVERNMENT AGENCY TO WHICH IT WAS SUBMITTED.**

**HERE, THE GOVERNMENT HAS IDENTIFIED TWO STATEMENTS WHICH YOU SHOULD CONSIDER:**

A. ON OR ABOUT JANUARY 27, 2020, THE DEFENDANT STATED, IN SUM AND SUBSTANCE, THAT HE DID NOT KNOW THE IDENTITY OF JOHN DOE.

B. ON OR ABOUT JANUARY 27, 2020, THE DEFENDANT STATED, IN SUM AND SUBSTANCE, THAT HE WAS NOT FAMILIAR WITH THE GAMBLING BUSINESS KNOWN AS "SAL'S SHOE REPAIR" LOCATED IN AND AROUND 41 MERRICK AVENUE IN MERRICK, NEW YORK.

THE GOVERNMENT MUST ONLY PROVE THAT ONE OF THESE STATEMENTS WAS FALSE, FICTIOUS, OR FRAUDULENT. YOU THE JURY MUST BE UNANIMOUS IN DETERMINING WHICH STATEMENT OR STATEMENTS

**WERE FALSE, FICTITIOUS OR FRAUDULENT. FOR EXAMPLE, IT WOULD NOT BE SUFFICIENT FOR SIX OF YOU TO FIND THAT STATEMENT A IS FALSE, AND SIX OF YOU TO FIND THAT STATEMENT B IS FALSE. THERE MUST BE AT LEAST ONE STATEMENT THAT ALL OF YOU BELIEVE CONSTITUTED A MATERIAL FALSE, FICTITIOUS OR FRAUDULENT STATEMENT IN ORDER TO CONVICT. THIS REQUIREMENT WILL BE REFLECTED ON THE VERDICT FORM THAT I WILL GIVE YOU.**

**<u>FOURTH ELEMENT: KNOWING AND WILLFUL CONDUCT</u>**

**THE FOURTH ELEMENT THE GOVERNMENT MUST PROVE BEYOND A REASONABLE DOUBT IS THAT THE DEFENDANT ACTED KNOWINGLY AND WILLFULLY.**

**I HAVE ALREADY EXPLAINED WHAT IT MEANS TO ACT KNOWINGLY AND WILLFULLY, AND THOSE INSTRUCTIONS APPLY HERE.**

**FIFTH ELEMENT: MATTER WITHIN THE JURISDICTION OF THE UNITED STATES GOVERNMENT**

**THE FIFTH ELEMENT THAT THE GOVERNMENT MUST PROVE BEYOND A REASONABLE DOUBT IS THAT THE STATEMENT WAS MADE WITH REGARD TO A MATTER WITHIN THE JURISDICTION OF THE GOVERNMENT OF THE UNITED STATES. TO BE WITHIN THE JURISDICTION OF A DEPARTMENT OR AGENCY OF THE UNITED STATES GOVERNMENT MEANS THAT THE STATEMENT MUST CONCERN AN AUTHORIZED FUNCTION OF THAT DEPARTMENT OR AGENCY.**

**I INSTRUCT YOU THAT THE FBI IS A PART OF THE UNITED STATES DEPARTMENT OF JUSTICE, WHICH IS A DEPARTMENT OR AGENCY OF THE UNITED STATES GOVERNMENT. I FURTHER INSTRUCT YOU THAT ONE OF THE AUTHORIZED FUNCTIONS OF THE DEPARTMENT OF JUSTICE, INCLUDING THE FBI, IS TO INVESTIGATE VIOLATIONS OF FEDERAL CRIMINAL LAW. I FURTHER**

**INSTRUCT YOU THAT RACKETEERING ACTIVITY AND ILLEGAL GAMBLING ARE VIOLATIONS OF FEDERAL CRIMINAL LAW.**

**IT IS NOT NECESSARY FOR THE GOVERNMENT TO PROVE THAT THE DEFENDANT HAD ACTUAL KNOWLEDGE THAT THE FALSE STATEMENT WAS TO BE UTILIZED IN A MATTER THAT WAS WITHIN THE JURISDICTION OF THE GOVERNMENT OF THE UNITED STATES. IT IS SUFFICIENT TO SATISFY THIS ELEMENT IF YOU FIND THAT THE FALSE STATEMENT WAS IN FACT MADE WITH REGARD TO A MATTER WITHIN THE JURISDICTION OF THE GOVERNMENT OF THE UNITED STATES.**

## III. RULES GOVERNING JURY DELIBERATIONS

### INTRODUCTION TO DELIBERATIONS

**YOU ARE ABOUT TO GO INTO THE JURY ROOM, MEMBERS OF THE JURY, TO BEGIN YOUR DELIBERATIONS. THAT BRINGS US TO THE THIRD AND FINAL PART OF MY CHARGE WHICH PROVIDES SOME GENERAL RULES REGARDING YOUR DELIBERATIONS.**

## SELECTING A FOREPERSON

**IN ORDER THAT YOUR DELIBERATIONS MAY PROCEED IN AN ORDERLY FASHION, FIRST YOU SHOULD HAVE A FOREPERSON. TRADITIONALLY, JUROR NUMBER ONE ACTS AS FOREPERSON. OF COURSE, HIS OR HER VOTE IS ENTITLED TO NO GREATER WEIGHT THAN THAT OF ANY OTHER JUROR.**

## DELIBERATIONS

KEEP IN MIND THAT NOTHING I HAVE SAID IN THESE INSTRUCTIONS IS INTENDED TO SUGGEST TO YOU IN ANY WAY WHAT I THINK YOUR VERDICT SHOULD BE. THAT IS ENTIRELY FOR YOU TO DECIDE.

BY WAY OF REMINDER, I CHARGE YOU ONCE AGAIN THAT IT IS YOUR RESPONSIBILITY TO JUDGE THE FACTS IN THIS CASE FROM THE EVIDENCE PRESENTED DURING THE TRIAL AND TO APPLY THE LAW, AS I HAVE GIVEN IT TO YOU, TO THE FACTS AS YOU FIND THEM FROM THE EVIDENCE.

WHEN YOU RETIRE, IT IS YOUR DUTY TO DISCUSS THE CASE FOR THE PURPOSE OF REACHING AGREEMENT IF YOU CAN DO SO. EACH OF YOU MUST DECIDE THE CASE FOR YOURSELF BUT SHOULD DO SO ONLY AFTER CONSIDERING ALL THE EVIDENCE, LISTENING TO THE VIEWS OF YOUR FELLOW JURORS, AND DISCUSSING IT FULLY. IT IS IMPORTANT THAT YOU REACH A VERDICT IF

**YOU CAN DO SO CONSCIENTIOUSLY. YOU SHOULD NOT HESITATE TO RECONSIDER YOUR OPINIONS FROM TIME TO TIME AND TO CHANGE THEM IF YOU ARE CONVINCED THAT THEY ARE WRONG. HOWEVER, DO NOT SURRENDER AN HONEST CONVICTION AS TO WEIGHT AND EFFECT OF THE EVIDENCE SIMPLY TO ARRIVE AT A VERDICT.**

## UNANIMOUS VERDICT

**ANY VERDICT YOU REACH MUST BE UNANIMOUS. THAT IS, WITH RESPECT TO EACH COUNT, YOU MUST ALL AGREE AS TO WHETHER YOUR VERDICT IS GUILTY OR NOT GUILTY AS TO THAT COUNT.**

## TIME AND PLACE OF DELIBERATIONS

**DELIBERATIONS ARE TO TAKE PLACE ONLY IN THE JURY ROOM. YOU WILL NOT DISCUSS THIS CASE WITH ANYONE OUTSIDE THE JURY ROOM. AND THAT INCLUDES YOUR FELLOW JURORS. YOU WILL ONLY DISCUSS THE CASE WHEN ALL 12 DELIBERATING JURORS ARE TOGETHER, IN THE JURY ROOM, WITH NO ONE ELSE PRESENT, BEHIND THE CLOSED DOOR. AT NO OTHER TIME IS THERE TO BE ANY DISCUSSION ABOUT THE MERITS OF THE CASE. PERIOD.**

## PUBLICITY

**AS I HAVE TOLD YOU REPEATEDLY EVERY DAY THROUGHOUT THE TRIAL AND REEMPHAZISE NOW, YOUR VERDICT MUST BE BASED SOLELY ON THE EVIDENCE PRESENTED IN THIS COURTROOM IN ACCORDANCE WITH MY INSTRUCTIONS. YOU MUST COMPLETELY DISREGARD ANY REPORT WHICH YOU GOT ON A SOCIAL MEDIA PLATFORM, READ IN THE PRESS, OR SEEN ON TELEVISION. INDEED, IT WOULD BE UNFAIR TO CONSIDER SUCH REPORTS, SINCE THEY ARE NOT EVIDENCE AND THE PARTIES HAVE NO OPPORTUNITY OF CONTRADICTING THEIR ACCURACY OR OTHERWISE EXPLAINING THEM AWAY. IN SHORT, IT WOULD BE A VIOLATION OF YOUR OATH AS JURORS TO ALLOW YOURSELVES TO BE INFLUENCED IN ANY MANNER BY SUCH PUBLICITY.**

## NO CONSIDERATION OF PUNISHMENT

**FINALLY, YOU CANNOT ALLOW A CONSIDERATION OF THE PUNISHMENT WHICH MAY BE IMPOSED UPON THE DEFENDANT, IF CONVICTED, TO INFLUENCE YOUR VERDICT IN ANY WAY OR TO ENTER INTO YOUR DELIBERATIONS.**

**THE DUTY OF IMPOSING A SENTENCE RESTS EXCLUSIVELY WITH ME. YOUR DUTY IS TO WEIGH THE EVIDENCE IN THE CASE AND TO DETERMINE WHETHER THE GOVERNMENT HAS PROVEN EVERY ELEMENT BEYOND A REASONABLE DOUBT SOLELY UPON SUCH EVIDENCE AND UPON THE LAW WITHOUT BEING INFLUENCED BY ANY ASSUMPTION, CONJECTURE, SYMPATHY, OR INFERENCE NOT WARRANTED BY THE FACTS.**

## NO COMMUNICATIONS RULE

**AS I AM SURE YOU CAN IMAGINE, IT IS VERY IMPORTANT THAT YOU NOT COMMUNICATE WITH ANYONE OUTSIDE THE JURY ROOM ABOUT YOUR DELIBERATIONS OR ABOUT ANYTHING TOUCHING THIS CASE. THERE IS ONLY ONE EXCEPTION TO THIS RULE. IF IT BECOMES NECESSARY DURING YOUR DELIBERATIONS TO COMMUNICATE WITH ME, YOU MAY SEND A NOTE, THROUGH THE MARSHAL, SIGNED BY YOUR FOREPERSON OR BY ONE OR MORE MEMBERS OF THE JURY. NO MEMBER OF THE JURY SHOULD EVER ATTEMPT TO COMMUNICATE WITH ME EXCEPT BY A SIGNED WRITING, AND I WILL NEVER COMMUNICATE WITH ANY MEMBER OF THE JURY ON ANY SUBJECT TOUCHING THE MERITS OF THE CASE OTHER THAN IN WRITING, OR ORALLY HERE IN OPEN COURT. IF YOU SEND ANY NOTES TO THE COURT, DO NOT DISCLOSE ANYTHING ABOUT YOUR DELIBERATIONS. SPECIFICALLY, DO NOT DISCLOSE TO ANYONE — NOT**

**EVEN TO ME — HOW THE JURY STANDS, NUMERICALLY OR OTHERWISE, UNTIL AFTER YOU HAVE REACHED A UNANIMOUS VERDICT ON EACH COUNT OR HAVE BEEN DISCHARGED.**

## JURY RECOLLECTION AND JURY NOTES

**KEEP IN MIND TOO THAT IN DELIBERATIONS, THE JURY'S RECOLLECTION GOVERNS, NOBODY ELSE'S. NOT THE COURT'S—IF I HAVE MADE REFERENCE TO THE TESTIMONY—AND NOT COUNSEL'S RECOLLECTION. IT IS YOUR RECOLLECTION THAT MUST GOVERN DURING YOUR DELIBERATIONS. IF NECESSARY DURING THOSE DELIBERATIONS, YOU MAY REQUEST BY JURY NOTE A READING FROM THE TRIAL TRANSCRIPT THAT MAY REFRESH YOUR RECOLLECTION.**

**PLEASE, AS BEST YOU CAN, TRY TO BE AS SPECIFIC AS POSSIBLE IN YOUR REQUESTS FOR READ BACKS; IN OTHER WORDS, IF YOU ARE INTERESTED ONLY IN A PARTICULAR PART OF A WITNESS'S TESTIMONY, PLEASE INDICATE THAT TO US. IT MAY TAKE SOME TIME FOR US TO LOCATE THE TESTIMONY IN THE TRANSCRIPTS, SO PLEASE BE PATIENT. AND, AS A GENERAL MATTER, IF THERE IS EVER A DELAY IN RESPONDING TO A JURY NOTE, PLEASE**

**UNDERSTAND THERE IS A REASON FOR IT. NONE OF US GOES ANYWHERE. AS SOON AS A JURY NOTE IS DELIVERED TO THE COURT BY THE MARSHAL, WE TURN OUR ATTENTION TO IT IMMEDIATELY.**

**IN THE SAME WAY, IF YOU HAVE ANY QUESTIONS ABOUT THE APPLICABLE LAW OR YOU WANT A FURTHER EXPLANATION FROM ME, SEND ME A NOTE. WE WILL PROVIDE A RESPONSE AS SOON AS WE CAN.**

## COMPLETION OF VERDICT SHEET

**I HAVE PROVIDED THE JURY WITH A VERDICT SHEET, WHICH IS SELF-EXPLANATORY. NEEDLESS TO SAY, HOWEVER, IF YOU HAVE ANY QUESTIONS ABOUT THE VERDICT SHEET, DO NOT HESITATE TO SEND THE COURT A NOTE ASKING FOR FURTHER INSTRUCTIONS.**

**WITH RESPECT TO EACH COUNT, YOU ARE TO RESOLVE INDIVIDUALLY THE ISSUE OF WHETHER THE GOVERNMENT HAS ESTABLISHED BEYOND A REASONABLE DOUBT THE ESSENTIAL ELEMENTS OF THE OFFENSE AS I HAVE DESCRIBED THEM TO YOU. THAT IS, YOU MUST ALL AGREE UNANIMOUSLY AS TO WHETHER YOUR VERDICT IS GUILTY OR NOT GUILTY.**

**WHEN YOU HAVE REACHED A DECISION, HAVE THE FOREPERSON RECORD THE ANSWERS, SIGN THE VERDICT FORM, AND PUT THE DATE ON IT—AND NOTIFY THE MARSHAL BY NOTE THAT YOU HAVE REACHED A**

**VERDICT. BRING THE COMPLETED VERDICT SHEET WITH YOU WHEN SUMMONED BY THE COURT.**

## JUROR'S OATH OF DUTY

**AS YOU BEGIN YOUR DELIBERATIONS, REMEMBER YOUR OATH SUMS UP YOUR DUTY, AND THAT IS: WITHOUT FEAR OR FAVOR TO ANY PERSON OR PARTY, YOU WILL WELL AND TRULY TRY THE ISSUES IN THIS CASE ACCORDING TO THE EVIDENCE GIVEN TO YOU IN COURT AND THE LAWS OF THE UNITED STATES.**

## DISMISSAL OF ALTERNATE JURORS

**IN A FEW MINUTES, I AM GOING TO EXCUSE OUR ALTERNATE JURORS. AS I TOLD YOU BEFORE, YOUR SERVICES WERE REQUIRED AS A SAFEGUARD AGAINST THE POSSIBILITY THAT ONE OF THE REGULAR JURORS MIGHT BE UNABLE TO COMPLETE HIS OR HER SERVICE. I COMMEND THE ALTERNATE JURORS FOR THEIR FAITHFUL ATTENDANCE AND ATTENTION. ON BEHALF OF THE COURT AND THE PARTIES, I THANK YOU FOR YOUR SERVICE.**

## PAUSE FOR EXCEPTIONS TO CHARGE

**MEMBERS OF THE JURY, I ASK YOUR PATIENCE FOR A FEW MOMENTS LONGER. IT MAY BE NECESSARY FOR ME TO SPEND A FEW MOMENTS WITH COUNSEL AND THE REPORTER AT THE SIDE BAR. IF SO, I WILL ASK YOU TO REMAIN PATIENTLY IN THE BOX, WITHOUT SPEAKING TO EACH OTHER, AND WE WILL RETURN IN JUST A MOMENT TO SUBMIT THE CASE TO YOU.**

**THANK YOU AGAIN FOR YOUR TIME AND ATTENTIVENESS.**